Nos. 96-843 & 96-847

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OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,
and
AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,
v.
FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.

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QUESTIONS PRESENTED

1. Whether banks have standing under the Administrative Procedure Act to challenge the National Credit Union Administration's purported misapplication of the common bond provision of the Federal Credit Union Act, 12 U.S.C. § 1759, where the banks' interests are antithetical to the interests that Congress intended to protect through that statutory provision.

2. Whether the policy of the National Credit Union Administration that permits federal credit unions to consist of multiple occupational groups, each with its own common bond, is a permissible interpretation of the statute that Congress entrusted the agency to administer.

PARTIES TO THE PROCEEDING

The National Credit Union Administration was the defendant-appellee below and is the petitioner in No. 96-843 before this Court.

AT&T Family Federal Credit Union ("ATTF") and Credit Union National Association, Inc. ("CUNA")—a trade association of credit unions—were intervenors-appellees below and are the petitioners in No. 96-847 before this Court. Neither ATTF nor CUNA have any parent companies or subsidiaries.

The American Bankers Association, Bankers Trust Company of North Carolina, First National Bank and Trust Company, Lexington State Bank, Piedmont State Bank, and Randolph Bank and Trust Company were plaintiffs-appellants below and are respondents in this Court.

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BRIEF FOR PETITIONERS AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.

OPINIONS BELOW

The opinions of the court of appeals on standing and the merits are reported at 988 F.2d 1272 and 90 F.3d 525 respectively, and are reproduced at pages 25a and 1a of the appendix to the petition in No. 96-847 ("Pet. App.") and pages 15a and 1a of the appendix to the petition in No. 96-843 ("NCUA Pet. App."). The opinions of the district court on standing and the merits are reported at 772 F. Supp. 609 and 863 F. Supp. 9 respectively, and are reproduced at Pet. App. 40a, 13a, and NCUA Pet. App. 32a, 43a.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1996. Petitioners' timely petitions for rehearing and suggestions for rehearing *en banc* were denied on October 23, 1996. Pet. App. 50a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petitions for a writ of certiorari were filed on November 26 and 27, 1996, and were granted on February 24, 1997. 117 S. Ct. 1079.

PERTINENT STATUTES AND REGULATIONS

Section 1759 of Title 12, U.S.C., and Section 702 of Title 5, U.S.C., are reproduced in an appendix to this brief. The pertinent provisions of the agency ruling at issue are reproduced at Pet. App. 57a-59a.

STATEMENT OF THE CASE

This case involves an attempt by respondents, various banks and their trade association (collectively, the "Banks"), to limit the membership of a federally-chartered credit union, petitioner AT&T Family Federal Credit Union ("ATTF"). The Banks challenged, under the Administrative Procedure Act ("APA"), the approval by the National Credit Union Administration ("NCUA") of certain amendments to ATTF's charter. These amendments had been approved pursuant to NCUA's policy of permitting a federal credit union to consist of multiple groups, provided the individuals in each group share with the other members of that group a "common bond" within the meaning of Section 109 of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759. The Banks contended that NCUA's multiple group policy was inconsistent with the governing statute and therefore invalid.

The district court, in separate rulings, held that the Banks had no standing under the APA to challenge NCUA's purported misapplication of the common bond provision, and that the multiple group policy was a permissible exercise of NCUA's authority. The court of

appeals, however, reversed both rulings. Although that court expressly held that the FCUA and its common bond provision were intended by Congress to promote the growth and viability of credit unions—interests that the court acknowledged are completely antithetical to the competitive interests of the Banks—the court nevertheless conferred standing on the Banks under the APA because they were, in the court's view, "suitable challengers" to vindicate the interests Congress *did* intend to protect. Then, after squarely rejecting the Banks' principal argument on the merits that Section 1759 does not permit multiple groups at all, the court nevertheless held that the statutory language unambiguously requires that all individuals within such multiple groups must have a single common bond.

As explained below, the court of appeals erred on both counts. This Court's "zone of interests" test permits standing under the APA only when a plaintiff's interests are among those that Congress intended to protect or regulate through the statutory provision in question. Yet the competitive interests of the Banks in restricting credit union operations are plainly not among those that Congress intended to protect or regulate through the common bond provision. That provision, like the FCUA itself, was unquestionably intended to protect credit unions and their members, not banks. Likewise, even if the Banks have standing, the court of appeals erred in determining that Congress clearly resolved the precise question presented in this case and therefore that no deference was owed to NCUA's policy.

The net result of both of these decisions has been to thwart the clear intent of Congress. Whereas Congress intended for the FCUA and its common bond provision to promote the rapid growth and financial stability of federal credit unions, the rulings of the court of appeals—if allowed to stand—threaten to devastate credit unions throughout the Nation by denying them the opportunity to achieve the strength and diversity necessary for continued viability. This obstruction of Congress' goals,

although consonant with the competitive interests of the Banks, amply demonstrates why the Banks are not within the zone of interests protected by the common bond provision and why, in any event, the Court should uphold NCUA's policy judgments on how best to administer its own statute.

A. The Federal Credit Union Act

The origins of cooperative credit organizations date to nineteenth century Europe. *See generally* J. Carroll Moody & Gilbert C. Fite, *The Credit Union Movement* 1-25 (1971). In this country, the first credit unions were established under state law in the early part of the twentieth century. *Id.* at 26-52. As would later be the case with the FCUA, a major impetus for these early credit unions was to meet the " 'demand for loans which [was] not being supplied by existing banking institutions,' " and to help eliminate high-rate money lenders—loan sharks. *Id.* at 34, 35 (citation omitted). The first general credit union law was enacted in Massachusetts in 1909, and Congress enacted its first credit union law in 1932, authorizing the establishment of credit unions in the District of Columbia. *See* 1909 Mass. Acts ch. 419; Pub. L. No. 72-190, Ch. 272, 48 Stat. 326 (1932).

The FCUA was enacted in 1934, in the wake of the Great Depression, "to make more available to people of small means credit for provident purposes through a national system of cooperative credit." Pub. L. No. 73-467, Ch. 750, 48 Stat. 1216 (1934) (preamble). The FCUA authorizes the granting of federal charters to credit unions, and defines a credit union as a cooperative organization formed for the purpose of "promoting thrift among its members and creating a source of credit for provident and productive purposes." 12 U.S.C. § 1752 (1). A distinctive attribute of credit unions is that members of the credit union own and control the organization for their mutual benefit. *Id.* § 1757(6). Members purchase shares in the organization with their deposits and vote on such matters as election of directors, with each

member receiving one vote regardless of number of shares. *Id.* §§ 1757(6), 1760. A credit union can make loans and extend credit to its members and to other credit unions, but not to the general public. *Id.* § 1757(5). Credit unions are managed by boards of directors and supervisory committees consisting entirely of credit union members, almost all of whom are unpaid volunteers. *Id.* § 1761. When the FCUA was enacted, credit union shares (deposits) were uninsured, but the law was amended in 1970 to provide for federal insurance. *See id.* §§ 1781-1790c.

The legislative history clearly reveals that the FCUA was intended by Congress to foster the rapid growth of credit unions and to protect their financial stability. Credit unions were intended to "bring normal-credit resources on a cooperative basis to the masses of the people whose buying power is now so often dissipated in high-rate interest charges." S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934). *See also* H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Congress felt that the "need for much more rapid national development" of credit unions was "very great." S. Rep. No. 555, *supra*, at 3. Noting that there had been no involuntary liquidations of state credit unions during the Depression, Congress believed that the fact that credit unions "have come through the depression without failures, when banks have failed so notably, is a tribute to the worth of cooperative credit and indicates clearly the great potential value of rapid national credit union expansion." *Id.* at 2, 3-4.

There is no evidence whatsoever that Congress enacted any provision of the FCUA—least of all the common bond provision—out of a concern to protect banks from competition with credit unions. Quite to the contrary, Congress saw credit unions as a "happy medium" between loan sharks and banks. 78 Cong. Rec. 7259 (1934) (Sen. Barkley). Banks were perceived as having disdained working people, because many borrowers of small means lacked adequate security or sought funds in amounts too small to justify a bank loan. *Id.* ("[B]ank[s]

* * * cannot extend credit to many of these people, because they do not have the required security"); *id.* at 12,225 (credit unions would serve individuals "who do not use and cannot use banks * * * for small borrowings") (Rep. Luce). Credit unions were intended to allow working people to obtain credit "[w]ithout being subject to the outrageous rates of loan sharks and others who prey upon people of that class." *Id.* at 7259 (Sen. Barkley).

B. The Common Bond Provision And NCUA's Multiple Group Policy

This case centers around the "common bond" provision of Section 109 of the FCUA, which specifies that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. § 1759. NCUA, through its governing Board, is the agency entrusted by Congress to administer the FCUA. *See* 12 U.S.C. §§ 1752a, 1766. Congress authorized NCUA, among other things, to "prescribe rules and regulations for the administration" of the FCUA, *id.* § 1766(a), and specifically authorized the agency to determine whether a federal credit union charter complies with the governing statute. *See id.* § 1754. When Congress created NCUA in 1970, it expressly stated its intent that the agency "provide more flexible and innovative regulation." S. Rep. No. 518, 91st Cong., 1st Sess. 3 (1970). NCUA has heeded this direction in implementing the common bond provision, modifying its policy over the years to respond to changes in the national economy and in the economics of federal credit unions. This regulatory evolution evinces the agency's understanding that it must implement the common bond provision in a "pragmatic" fashion, and continually re-evaluate its policy "to reflect changing social, commercial and economic conditions." 45 Fed. Reg. 8282 (1980); 44 Fed. Reg. 43,737 (1979).

Even before the promulgation of the multiple group policy at issue in this case, NCUA had implemented the

common bond provision so as to permit a credit union's membership to include employees of different employers located within the same general geographic area. In 1972, NCUA provided that credit unions could consist of employees of different employers, provided that "as a consequence of their employment and relationship they could be expected to effectively operate a credit union." NCUA, *Organizing a Federal Credit Union* 3 (Sept. 1972). Thus, NCUA expressly permitted credit unions to be formed by employees of multiple employers who worked in the same shopping center, industrial park, building, or airport. *Id.* at 7.

In regulations promulgated in 1980, the agency continued to permit multiple employer groups subject to geographic limitations. Those regulations provided that "[o]ccupational Federal credit unions may be chartered on the basis of a common bond of employment by the same employer, employment in certain related activities in the same general locality, *or employment within a very limited specified area.*" 45 Fed. Reg. 8285 (1980) (emphasis supplied). Thus, pursuant to this policy, an "occupational" credit union could consist of employees of multiple unrelated employers, provided those employers were located in the same area.

In 1982, NCUA adopted the policy that is directly at issue in this case. In Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16,775 (1982), the agency permitted the granting of charters and charter amendments to credit unions that desire to serve multiple occupational groups, provided each of these groups has its own common bond. Two months later, the agency issued IRPS 82-3, which reaffirmed the policy but added the limitation that all the groups be within a "well-defined area." 47 Fed. Reg. 26,808 (1982). NCUA later construed the term "well-defined area" to mean "within a 'well-defined area' of an existing branch" of the credit union. 48 Fed. Reg. 22,899 (1983). In 1989, NCUA further modified this language to require that each group

be within the "operational area of a planned home or branch office," which NCUA defined as "the area surrounding the home or a branch office that can be reasonably served by the applicant * * * as determined by NCUA." IRPS 89-1, 54 Fed. Reg. 31,170 (1989).

Thus, pursuant to this policy, a federal credit union may consist of multiple occupational groups, provided each group has its own common bond and is located in an area that can reasonably be served by the home or a branch office of the credit union. Importantly, however, membership in a credit union remains limited to *groups*: no person may become a member of a credit union unless that person is a member of one of the groups set forth in the credit union's charter approved by NCUA.[1] Unlike a bank, a credit union may not offer its services to any member of the general public.

Moreover, there are stringent limitations on the types of groups that NCUA will approve under its multiple group policy. Each group, of course, must have its own common bond, which must include a geographic definition. *See* 59 Fed. Reg. 29,076 (1994). As NCUA has made clear, not all groups of employees will have the requisite occupational common bond. For example, NCUA will not allow a credit union to include proposed occupational groups consisting of "[e]mployees of engineering firms in Seattle, Washington" or "[p]ersons employed or working in Chicago, Illinois," because although these aggregations are certainly "groups," they lack the requisite common bond. *Id.* Each group in a credit union must individually request inclusion and the credit union must show to the satisfaction of NCUA that it has the financial resources and management capability to provide quality service to each group. *Id.* at 29,078.[2]

[1] Membership may also be extended to the immediate family of a credit union member and to employees of the credit union. *See* 59 Fed. Reg. 29,079 (1994).

[2] The types of "associational" groups that NCUA will approve are likewise generally limited to groups (such as student or church groups) consisting of individuals "who participate in activities developing common loyalties, mutual benefits, and mutual interests." 59 Fed. Reg. 29,076 (1994). Examples of proposed associational groups that NCUA will not approve include "associations formed primarily to obtain a federal credit union charter," and groups consisting of "[v]eterans of U.S. military service," or "[c]ustomers of ABC Insurance Company." *Id.* Again, although these terms certainly define "groups," the members of each of these groups lack the requisite common bond.

When NCUA modified its common bond regulations in 1980, it noted the need to provide greater regulatory flexibility to address "the changes that have taken place in communities, associations, and employer groups." 45 Fed. Reg. 8282 (1980). Likewise, in 1982 Congress acknowledged that "credit unions * * * are forced to adjust to the economic turbulence of a recovery period which has seen a large number of plant closings * * *." S. Rep. No. 536, 97th Cong., 2d Sess. 34 (1982). Thus, when it issued IRPS 82-1, NCUA stated that its multiple group policy was intended "to ensure the continued availability of credit union service." 47 Fed. Reg. 16,775 (1982).

NCUA further explained the rationale for the multiple group policy in an October 28, 1983 letter from NCUA's Chairman to the Chairman of the House Committee on Banking, Finance and Urban Affairs.[3] In that letter, the Chairman explained that the policy was intended to adjust NCUA's regulations "to changing social conditions and to bring credit union services to groups desiring such services but not yet served." J.A. 45. He noted that because the agency's experience had shown that "some groups were too small either by themselves or when grouped together to support a viable credit union," the multiple group policy ensured that a credit union "could serve groups not otherwise eligible for a viable credit

[3] The FCUA provides that "[t]he Chairman of the [NCUA] Board shall be the spokesman for the Board and shall represent the Board and the National Credit Union Administration in its official relations with other branches of the Government." 12 U.S.C. § 1752a(e).

union charter and * * * survive hard economic times." J.A. 44. He also explained that diversification provided protection against economic downturns or restructurings because "[c]redit unions that served only one employer or one industry could be forced into liquidation by plant closings or major industrial slumps, whereas a credit union whose membership was made of distinct groups, each group serving different employees or industries, could continue to serve its members," thereby furthering Congress' goal of fostering a truly national system of cooperative credit. J.A. 44. As the Chairman stated, the policy reflected "the major changes occurring in smokestack America with an ever increasing number of factories closing down while simultaneously there has been a major increase in industries with less than a hundred people." J.A. 43.

In 1984, NCUA reiterated one of the main reasons for the multiple group policy, noting that:

> The primary intent of the newly expanded field of membership policy and the essential basis for all changes in the policy since April 1982 is to provide credit union services to new groups—to people who do not presently have credit union service available to them. [49 Fed. Reg. 46,537 (1984).]

The policy itself was subsequently reaffirmed in 1989 and in 1994. *See* IRPS 89-1, 54 Fed. Reg. 31,168 (1989); IRPS 94-1, 59 Fed. Reg. 29,066 (1994), *codified at* 12 C.F.R. § 701.1.

Congress has been well aware of NCUA's multiple group policy since shortly after it was promulgated. *See* Pet. App. 22a n.14. In addition to the 1983 letter from NCUA's chairman, NCUA described the multiple group policy in its 1982 Annual Report to Congress, *see* NCUA, 1982 Annual Report 1, the American Bankers Association specifically objected to the policy in testimony submitted to an oversight committee in 1987, *see Unrelated Business Income Tax: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th

Cong., 1st Sess. 1883 (1987), and the General Accounting Office described the policy in a 1991 report to Congress. *See* GAO, *Credit Unions: Reforms for Ensuring Future Soundness* 218-219 (July 1991). Yet in the 15 years that the multiple group policy has been in effect, Congress has never altered NCUA's interpretation of the common bond provision, despite amending the statute on more than a dozen occasions. *See* NCUA Pet. 8-9 n.4.

C. The Proceedings Below

In 1990, eight years after NCUA had issued IRPS 82-1, the Banks brought this APA action against NCUA, challenging NCUA's 1989 and 1990 approvals of certain amendments to ATTF's charter. These amendments, predicated on the multiple group policy, permitted ATTF to expand its field of membership to include various groups of employees largely based in North Carolina and Virginia. The Banks contended that these approvals contravened the statutory common bond provision. ATTF and CUNA were permitted to intervene in support of NCUA.

1. *The Decisions On Standing*

The district court dismissed the action on the ground that the Banks lacked standing under the APA. After noting that "[t]he legislative history of the FCUA makes it clear that the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interests of banks," the court held that "it would defy logic to assume that Congress, in passing the FCUA, wanted to protect the interest of banks." Pet. App. 45a, 46a. Likewise, the court explained that the common bond provision was not intended to protect banks, but rather "was designed to ensure that credit unions remain responsive to those they were designed to serve." *Id.* at 46a. Thus, because "the interests of banks will rarely if ever coincide with those of credit unions," the court held that "commercial banks are not within the zone of interests which Congress in-

tended to protect when it passed the FCUA." *Id.* at 47a. The Banks appealed this decision.

The court of appeals specifically *agreed* with the district court's interpretation of Congress' intent in enacting the FCUA and the common bond provision. The court held that "Congress did not, in 1934, intend to shield banks from competition from credit unions." Pet. App. 30a. To the contrary, the court found this notion "anomalous" because Congress' "general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *Id.* Likewise, as did the district court, the court of appeals found that the common bond provision, far from being intended to protect the competitive interests of banks, "was seen [by Congress] as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." *Id.* at 31a. Accordingly, the court held that banks were *not* among the intended beneficiaries of the FCUA.

Nevertheless, the court of appeals held that the Banks had standing under that court's own "suitable challenger" doctrine, a "more subtle" test (Pet. App. 31a) that accords standing to a party whose interests, "while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *Hazardous Waste Treatment Council* v. *EPA*, 885 F.2d 918, 922 (D.C. Cir. 1989) (*"HWTC IV"*). The court held that even though the goals of the FCUA and the common bond provision were completely at odds with the competitive interests of banks, their interests were nevertheless sufficiently aligned with those that Congress did intend to benefit. Pet. App. 36a. Accordingly, the court reversed the district court judgment and remanded for further proceedings.[4]

[4] Judge Wald, who had dissented from the court of appeals' original formulation of its "suitable challenger" doctrine, *see HWTC IV*, 885 F.2d at 930 (Wald, C.J., dissenting), only reluctantly concurred in the judgment on standing in this case, noting that the doctrine is "without roots either in Supreme Court law or in the general purposes of standing." Pet. App. 38a (Wald, J., concurring) (footnote omitted). *See also HWTC IV*, 885 F.2d at 930 (court's "rewriting of 'zone of interests' law is * * * fundamentally at odds with Supreme Court * * * precedent") (Wald, C.J., dissenting).

2. The Decisions On The Merits

Following remand, the district court granted summary judgment in favor of petitioners, holding that "NCUA's interpretation of the common-bond provision is a reasonable construction of an ambiguous statute." Pet. App. 24a. The court held that the statutory language is ambiguous, and that "a reasonable reading of the common bond provision is that a credit union may have several groups, each with its own common bond." *Id.* at 19a. After noting that the Banks "have not seriously argued that the interpretation under challenge is unreasonable," the court held that such an argument "would be a daunting task" because "NCUA's interpretation in fact advances Congress' goal of promoting the creation and growth of credit unions." *Id.* at 23a-24a. The court therefore upheld the challenged agency actions, and the Banks once again appealed.

The court of appeals again reversed, holding that the language of the common bond provision unambiguously precluded NCUA's interpretation. The court, however, expressly rejected the Bank's principal argument on the merits: that the statute prohibits a federal credit union from including more than one occupational group. Rather, the court found that the statutory language—which uses the plural form "groups"—could plausibly be read to permit more than one group in a credit union. Pet. App. 6a-7a. Nevertheless, employing a 1927 dictionary definition that had not been urged by any party, the court held that the language of the statute indicates that all individual members of a credit union must have a single common bond "regardless whether the FCU is composed of

one or of multiple groups." Pet. App. 7a. The court based this conclusion on its analysis that "a common bond is implicit in the term 'group,' " and therefore "if two or more 'occupational groups' can be said to have a common bond, it must be because there is a characteristic common to each and every member of the several groups." *Id.* at 6a-7a. The court further reasoned that NCUA's policy of permitting multiple unrelated occupational groups is inconsistent with the statutory language governing community-based credit unions, which indicates that groups in different neighborhoods may not form a single credit union. *Id.* at 8a-9a.

Then, to test its "hypothesis" that the statute was unambiguous, *id.* at 9a, the court analyzed its purpose and legislative history. The court concluded that "Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other," and that "growth on the scale achieved by ATTF is inconsistent with that purpose." *Id.* at 10a. Finally, the court concluded that the legislative history of the FCUA did not "convincingly contradict[]" the court's interpretation of the statutory language. *Id.* at 11a. Accordingly, the court reversed the judgment of the district court and remanded for declaratory and injunctive relief. *Id.* at 12a.[5]

[5] Following the court of appeals' decision on the merits, the American Bankers Association and two other plaintiffs filed a new action in district court against NCUA, seeking a nationwide injunction preventing the addition of new unrelated groups in *any* federal credit union and preventing the addition of any new members to such groups that had previously been approved. *See American Bankers Association* v. *NCUA*, No. 96-CV-2312 (TPJ) (D.D.C. filed October 7, 1996). On October 25 and 31, 1996, the district court granted that relief. On December 24, 1996, the court of appeals stayed, pending resolution of this case, that portion of the district court's injunction that had prohibited credit unions from adding new members to previously approved groups, but not that portion of the injunction that had prohibited the approval of new groups.

The plaintiffs in that new action have also served notice in their complaint that they will seek an order compelling NCUA "to cause all federal credit unions, notwithstanding any contrary past authorization, to reduce their existing membership" in light of the decision below—i.e., to expel members added since 1982 pursuant to the multiple group policy. Amended Complaint for Declaratory and Injunctive Relief, *American Bankers Association* v. *NCUA*, No. 96-CV-2312 (TPJ) (D.D.C. filed November 15, 1996).

SUMMARY OF ARGUMENT

I. The Banks have not carried their burden of demonstrating that they have standing under the APA. A party has standing to challenge agency action only if "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990). The Banks, however, have not shown that the common bond provision was in any sense designed to benefit them or to protect the interests they assert; instead, the provision was intended to protect credit unions and their members by incorporating into federal credit unions one of the features Congress attributed with allowing credit unions to emerge from the Great Depression unscathed, while banks failed. The Banks' competitive interests in weakening credit unions are completely at odds with Congress' purposes of encouraging the growth and financial viability of credit unions. The Banks have not shown that Congress sought to protect them from competition with credit unions; to the contrary, the evidence indicates that Congress saw credit unions as generally serving a market that banks disdained.

For these reasons, the Court should also reject the court of appeals' "suitable challenger" doctrine, which accords standing to parties whose interests are concededly not among those Congress intended to protect whenever, in the view of a particular court, the party's interests "coincide" with the protected interests. As this case demonstrates, that doctrine is not only wholly unprincipled but could confer standing on parties whose goals are directly contrary to those that Congress intended to further.

II. In the event the Court reaches the merits—which it should not do—the Court should uphold NCUA's interpretation of the common bond provision. Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court defers to an agency's reasonable interpretation of its statute unless Congress' intent is "clear" as to the "precise question" at issue. *Id.* at 842. Here, Congress' intent is far from clear as to whether the common bond provision permits multiple occupational groups, each with its own common bond. The statute provides that "federal credit union membership" shall be limited to "groups having a common bond." At best from the Banks' perspective, the statute is ambiguous. The use of the plural form "groups" suggests the possibility of multiple groups, and other language in the same provision indicates that "federal credit union membership" refers to membership in a single credit union, indicating that Congress contemplated multiple groups in a single credit union. The Court should reject the court of appeals' alternative reasoning that, because the term "group" itself already implies a common bond, the statute unambiguously provides that each of the multiple groups within a single credit union must share a single common bond. The term "common bond" is not mere surplusage when applied to a single group, as it imparts a degree of cohesiveness otherwise lacking in the looser term "group". That, in any event, is how the agency understands the terms "group" and "common bond," and there is no justification for overturning that understanding.

Nor do the legislative history or purposes of the statute demonstrate that Congress' intent is clear on the permissibility of NCUA's multiple group policy. The sparse legislative history of the common bond provision is ambiguous on that precise question, and NCUA's policy in fact furthers the statute's purpose of ensuring that credit union members are part of a cooperative venture with others similarly situated. For under that policy, a member of an occupational credit union must always be part of a group

that includes the individual's co-workers. For the same reasons, the Court should uphold NCUA's reasonable interpretation of the ambiguous statutory language. The multiple group policy, which was established to adjust NCUA's regulation to changes in the economy, is plainly a reasonable balancing of Congress' goals of encouraging the growth and financial stability of credit unions while ensuring that members remain part of a cooperative venture. Indeed, the severe harms that would befall the national credit union system in the absence of NCUA's policy show both that the policy is reasonable and that the Banks are not within the statute's zone of interests.

ARGUMENT

I. THE BANKS LACK STANDING

A. A Party Has Standing Under The APA Only If Its Interests Are Among Those That Congress Intended To Protect Or Regulate Through The Provision In Question

The Banks brought this action under the APA, which authorizes suits only by persons who have been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. In *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), the Court interpreted this language as imposing a prudential standing requirement that limits cases under the APA to those where "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. *Accord, Bennett* v. *Spear*, 117 S. Ct. 1154, 1161, 1167 (1997). Thus, "to be 'adversely affected or aggrieved * * * within the meaning' of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *National Wildlife Federation*, 497 U.S. at 883 (emphasis

in original). *Accord, Bennett*, 117 S. Ct. at 1167; *Air Courier Conference of America* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523 (1991). As this Court has made clear, this statutory inquiry is separate from constitutional requirements: not all prospective plaintiffs who satisfy the "injury-in-fact" and other requirements of Article III will be accorded APA standing. *See Air Courier*, 498 U.S. at 524. As plaintiffs, the Banks bear the burden of proving that they have standing under the zone of interests test. *See id.* at 523 (plaintiffs "must show that they are within the zone of interests sought to be protected"); *National Wildlife Federation*, 497 U.S. at 883 (plaintiff bears burden of proving prudential standing).

The Court has stressed on numerous occasions that the zone of interests analysis turns exclusively on the intent of Congress in enacting the statute in question. As the Court explained in *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987), "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Id.* at 399 (quoting *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984)). Thus, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400. *See also id.* at 394 (*Data Processing* decision "was basically one of interpreting congressional intent"); *INS* v. *Legalization Assistance Project of the Los Angeles County Federation of Labor*, 510 U.S. 1301, 1305 (1993) (granting stay of district court decision allowing standing where there was "no indication that [the statutory provision] was in any way addressed to [the plaintiffs'] interests") (O'Connor, J., in chambers); *Barlow* v. *Collins*, 397 U.S. 159, 164 (1970) (upholding standing because "[i]mplicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of [the plaintiffs]").

Although the zone of interests test "is not meant to be especially demanding," *Clarke*, 479 U.S. at 399, it does impose substantial limits on the ability of private plaintiffs to invoke the power of the judiciary against the executive branch. In particular, "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399-400.

For example, in *National Wildlife Federation, supra*, the Court postulated the following circumstance in which a plaintiff would lack standing under the APA:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute. [497 U.S. at 883.]

And in *Air Courier*, the Court denied standing to a postal union that sought to challenge agency action permitting certain private mail service allegedly in violation of a statute generally barring the private carriage of mail. Although expansion of such service certainly adversely affected the union's interests by diverting business from the union's employer, the Court found no evidence that the union's interests were among those Congress intended to protect through the statute.

B. The Interests Of The Banks Are Directly Antithetical To The Interests Congress Intended To Protect Through The FCUA And The Common Bond Provision

The Banks have not come close to carrying their burden of proving that their interests are within the zone of

interests that Congress intended to protect through the common bond provision. The Banks have invoked their position as "competitors" of credit unions as the sole basis for allowing them to challenge NCUA's application of the common bond provision. Yet the Banks' argument in favor of their standing is even less credible than that of the reporting company hypothesized in *National Wildlife Federation*. For the competitive interests of Banks are not merely unrelated to the interests that Congress sought to protect or regulate through the FCUA and its common bond provision; the Banks' interests in weakening credit unions are in fact completely antithetical to Congress' avowed goals of encouraging their rapid growth and continued viability. Accordingly, the competitive interests of the Banks are so "inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

1. There can be little dispute as to Congress' intent in enacting the FCUA. As noted above (*see supra* at 5-6), Congress intended the FCUA to foster the rapid development of a national system of credit unions at a time when the Nation's financial system was in shambles following the Great Depression. Congress enacted the FCUA to foster the "rapid national development" of credit unions, which Congress believed was being hampered by restrictive or non-existent state chartering laws. S. Rep. No. 555, *supra*, at 3. *See also id.* at 4 (Congress noted the "great potential value of rapid national credit union expansion"); 78 Cong. Rec. 7259-60 (1934) (Sen. Sheppard); *id.* at 12,225 (Rep. Patman). Congress also believed that national credit unions were vital to the Nation's economy because "industrial recovery depends on the buying power of the masses." S. Rep. No. 555, *supra*, at 1.

The common bond provision was intended to further these same purposes. *See Bennett*, 117 S.S. Ct. at 1167 (whether a plaintiff's interest is within zone of interests

"is to be determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies"). The various limitations on the membership, activities, and practices of credit unions that Congress wrote into the FCUA were seen as important safeguards of their financial stability. Congress was plainly impressed by the fact that state credit unions, "managed by fellow workers," had weathered the Great Depression without a single involuntary liquidation, a fact that Congress attributed to their "exceptional" record for "honest management." S. Rep. No. 555, *supra*, at 3-4, 2. Congress stressed that "self-managed" credit unions had allowed their members "with their own money and under their own management to take care of their own short-term-credit problems at a normal interest rate." *Id.* at 2. Congress further believed that credit unions would be "incapable of exploitation" in part "because of the limitations contained in the law." *Id.* at 3. *See also* 78 Cong. Rec. 7261 (1934) (credit unions are based on the "supposition that the brotherhood of man is a good business principle"). The common bond provision—together with the provisions requiring credit unions to be managed by and for their members—were intended by Congress as a means of strengthening federal credit unions and protecting them from the threat of insolvency or financial instability. This understanding was shared by early credit union organizers as well. *See generally* Jerry Burns, *Origin of the Term "Common Bond" in Credit Union Usage: A Progress Report* (CUNA, March 1979).[6]

There is no evidence that Congress, in enacting the FCUA, was at all concerned with the competitive inter-

[6] Although some early credit union laws did not have any common bond provisions (*see, e.g.*, 1909 Mass. Acts ch. 419), the concept appeared in this country at least as early as 1914 (*see* Burns, *supra*, at 9), and by 1929 a number of states had enacted credit union statutes with common bond provisions. *See, e.g.*, Act Providing for Organization of Credit Unions in State of Missouri, § 5 (1929); 1929 Mont. Laws 105, § 9; 1929 Ariz. Sess. Laws 58, § 6.

ests of banks. The language of the statute, of course, is the most reliable indicator of Congress' intent, and it says nothing whatever about banks or competition. *See, e.g., Air Courier*, 498 U.S. at 524-525 ("The particular language of the statutes provides no support for respondents' assertion that Congress intended to protect jobs with the Postal Service."). Nor does the legislative history evince any concern for the interests of banks. Rather, as noted above (*see supra* at 5-6), precisely the opposite was true. Congress saw credit unions as a "happy medium between the loan shark and the bank." 78 Cong. Rec. 7259 (1934) (Sen. Barkley). Congress believed that potential credit union members had been disdained by banks, "which cannot extend credit to many of these people, because they do not have the required security." *Id.* Credit unions were therefore intended in part to serve individuals "who do not use and cannot use banks * * * for small borrowings." *Id.* at 12,225 (Rep. Luce). *See also id.* at 12,224 (credit unions "are not comparable" to banks) (Rep. Steagall).

In the absence of a national credit union law, Congress believed that these individuals would be left to the mercy of loan sharks or without access to any credit whatsoever. *See id.* at 7259 ("credit unions, nationally extended, will close the great gap in the credit structure, a gap which leaves men and women of small means * * * largely at the mercy of usurious money lenders") (Sen. Sheppard); *id.* at 12,224 (growth of credit unions "has been a battle between the men on the one hand who have taken interest in their fellows, and the loan sharks on the other") (Rep. Luce).[7] There is no indication that commercial banks or banking interests opposed the FCUA or had any role in influencing the drafting of the common bond provision.

[7] Similar notions were expressed during consideration of the earlier District of Columbia Credit Union Act, upon which the FCUA was modeled. *See Incorporation of Credit Unions: Hearings Before the Committee on the District of Columbia on S. 1159*, 72d Cong., 1st Sess. 14 (1932) (testimony that credit unions would be beneficial alternatives to "loan sharks" who were "charging exorbitant interest rates"); *id.* at 28 (credit unions would "bring out savings and concentrate savings in credit unions that would not, otherwise, find the banks") (Sen. Gore).

In the face of this evidence of Congress' intent, it is not surprising that every court to have addressed the issue —including the court of appeals in this case—has held that the purpose of the common bond provision was to protect credit unions and their members, not to protect banks (or, for that matter, loan sharks) from competition with credit unions. As the court of appeals explained, rejecting the Banks' argument to the contrary, banks "were not intended beneficiaries of the FCUA" because

> Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained. [Pet. App. 26a, 30a.]

See also id. at 31a ("we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks").

The court of appeals recognized that the common bond provision was not designed to protect the competitive interests of banks but rather, together with the requirement that credit unions extend loans only to members, was intended to "ensure that credit unions would effectively meet *members'* borrowing needs." *Id.* (emphasis supplied). According to the court, Congress assumed that "a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default," thereby allowing credit unions to "'loan on character.'" *Id.* (quoting 78 Cong. Rec. 12,223 (1934) (Rep. Luce)). Thus, "[t]he common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to *credit unions'* continued success."

Id. (emphasis supplied). *See also id.* at 15a-16a (district court holding that the common bond provision was intended "to insure the financial stability of credit unions by providing a sense of cohesiveness among members and by enabling the members to establish a borrower's credit worthiness at minimum cost; and to promote the growth of credit unions because it was faster and easier to form a credit union with members who already had a common bond").

Other courts have reached the same conclusions with respect to the FCUA and state statutes containing similar provisions. As the Fourth Circuit held in *Branch Bank and Trust Co.* v. *National Credit Union Administration Board*, 786 F.2d 621, 626 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), "[c]onsistent with the general goals of the statute, the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks." [8]

The interests of credit unions and their members—not those of banks—were the interests Congress intended to protect through the common bond provision. This is not a case where the FCUA or the common bond provision reflected any "hard-fought compromises" between the in-

[8] *See also Barany v. Buller*, 670 F.2d 726, 734 (7th Cir. 1982) ("The salient feature of credit unions is their democratic control and management, which are buttressed, in part, by the Act's * * * limitation of membership to groups with a common bond."); *Minnesota League of Credit Unions* v. *Minnesota Department of Commerce*, 467 N.W.2d 42, 46 (Minn. Ct. App. 1991) ("The purpose of the common bond requirement is to assure the credit union's interest will be unified, cohesive, and first in the minds and purposes of the credit union's management."), *aff'd*, 486 N.W.2d 399 (Minn. 1992); *Casazza* v. *Department of Commerce*, 350 N.W.2d 855, 859 (Mich. Ct. App. 1984) ("We do not interpret the current credit union statute as being designed to curtail possible competition by the credit unions with the banking and savings and loan institutions. We view the intent of the Michigan credit union statute to be to encourage growth of credit unions and increases in membership.").

terests of putative credit unions and the competitive interests of banks. *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986). Banks were simply not in the picture; indeed, that fact was the very reason prompting Congress to act.

2. Given that Congress plainly intended the common bond provision to serve the interests of credit unions and their members and did not intend in any way to protect or regulate the competitive interests of banks, it necessarily follows that banks are not within the "zone of interests" of the statute and therefore lack standing to challenge what they perceive to be NCUA's misapplication of the common bond provision. *See Branch Bank*, 786 F.2d at 626 ("If the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position."). The competitive interests of the Banks in weakening credit unions are completely at odds with Congress' intent to strengthen credit unions and encourage the rapid development of a national credit union system. If the "zone of interests" test is to have any limits at all, it must surely prohibit standing in a case such as this, where the interests the plaintiffs seek to vindicate are not simply beside the point—as with the hypothetical reporting company in *National Wildlife Federation*—but in fact diametrically opposed to the interests Congress intended to protect.

Such a result is supported by this Court's most recent decisions applying the zone of interests test. In *Air Courier*, the Court held that postal workers lacked standing to challenge an administrative decision under the Postal Express Statutes ("PES") opening certain mail delivery services to private firms. The Court explained that to determine standing "[w]e must inquire * * * as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes." 498 U.S.

at 524. The Court then denied standing because the statutes reflected no intent to benefit the employment interests of postal workers, even though the statutes had been intended in part to protect those workers' employer —the Postal Service—from private competition. *Id.* at 528.

Likewise, in *Bennett*, this Court recently concluded that ranchers who alleged that they would lose water as a result of an administrative decision made pursuant to the Endangered Species Act had standing under the APA to challenge that decision as violative of a statute requiring that the agency's decisions be based on " 'the best scientific and commercial data available.' " *Bennett*, 117 S. Ct. at 1168 (quoting 16 U.S.C. § 1536(a)(2)). Examining Congress' intent in enacting that provision, the Court held that one of its purposes (if not its primary purpose) was "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives" and that the provision was "intended, at least in part, to prevent uneconomic (because erroneous) * * * determinations." *Id.* Accordingly, the Court held that the ranchers' "claim that they are victims of such a mistake is plainly within the zone of interests that the provision protects." *Id.*

As in all the Court's other decisions upholding standing, the plaintiffs in *Bennett* had standing because their economic interests were among those that Congress specifically intended to protect through the statutory provision they sought to enforce. In this case, by contrast, there is no indication that the Banks' competitive interests were an "explicit concern" of the common bond provision, *id.*, and every indication that they were not.

3. This is therefore not a case where Congress has evinced an intent to regulate competition through a particular statute, thereby according standing to a competitor of the regulated entity. For example, in *Data Processing* the Court held that competitors of banks had standing to challenge agency actions because "Congress had arguably

legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." *Investment Company Institute* v. *Camp*, 401 U.S. 617, 620 (1971) ("*ICI*") (citing *Data Processing*, 397 U.S. at 157). *See also Bennett*, 117 S. Ct. at 1167 (*Data Processing* plaintiffs were accorded standing because "their commercial interest was sought to be protected by the *anti-competition limitation* contained in § 4 of the [Bank Service Corporation Act]") (emphasis supplied). Likewise, in *ICI* the Court held that competitors of banks had standing to challenge an administrative decision as violative of the Glass-Steagall Act because "Congress did legislate against the competition that the petitioners challenge." 401 U.S. at 621. *Accord*, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970). And in *Clarke*, the Court held that the statute in question was intended by Congress "to keep national banks from gaining a monopoly control over credit and money through unlimited branching," and therefore that the banks' competitors were within the zone of interests protected by that statute. 479 U.S. at 403.

This case, by contrast, does not involve an "entry restricting" statute that was intended to limit the competitive reach of regulated firms. The FCUA and its common bond provision were not intended to limit the competitive reach of credit unions but rather were intended to protect the credit unions and their members. The problem, as Congress saw it, was not that credit unions might compete with banks for the business of working people, but that *no* entity was providing service to these individuals. Facilitating such service—not limiting competition—was Congress' concern in enacting the FCUA.

Nor is there any indication that Congress believed that the common bond provision would restrict the ability of credit unions to compete with banks or that such a restriction on competition was necessary in order to achieve some greater end. *Cf. Clarke*, 479 U.S. at 398 (in *ICI*, "it was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, *had forbidden banks to compete* with

plaintiffs by entering the investment company business") (emphasis supplied). Indeed, if Congress had truly been concerned about restricting the ability of credit unions to compete with banks, the common bond provision would not have been its chosen mechanism. For even under the Banks' restrictive interpretation of that provision, the statute would permit the formation of large, nationwide credit unions with thousands of members (such as those serving members of the military or employees of large companies) that would be formidable competitors to any bank that desired to offer the same financial services.[9]

As this Court's cases make clear, the lack of any evidence that the Banks' interests were among those that Congress intended to protect or regulate through the common bond provision conclusively demonstrates that they are not within the zone of interests protected by that provision and therefore lack standing to pursue this action. But even if the Court were to conclude that Congress' precise intent in enacting the common bond provision is unclear, it is the *Banks* who bear the burden of demonstrating that their interests are among those that Congress intended to pro-

[9] There is in fact no indication that NCUA's interpretation of the common bond provision has caused the credit union movement to become a significant competitor to the banking industry. Even though NCUA's multiple group policy has been in effect for nearly 15 years, the relative market shares of banks and credit unions, as measured by percentages of total household financial assets managed, were the same in 1995 as in 1980, with credit unions having a mere 2% of the market. *See* Affidavit of Keith Peterson ¶ 3, *American Bankers Ass'n* v. *NCUA*, Nos. 96-5347 *et al.* (D.C. Cir.) (filed Mar. 6, 1997). And during that period, credit unions' share of the market for consumer installment credit (a principal activity of credit unions) actually *fell* from 13% to 12%, while the share of banks rose from 50% to 57%. *Id.* ¶ 8. As of June 1996, the total assets of federally insured banks were more than 15 times larger than those of federal credit unions and more than 30 times larger than those of federal credit unions containing multiple groups. *See* Affidavit of Wayne Winegarden ¶ 5 (Oct. 23, 1996) (R. 94); Second Declaration of David M. Marquis ¶ 5, *American Bankers Ass'n* v. *NCUA*, Nos. 96-5347 *et al.* (D.C. Cir.) (filed Dec. 11, 1996) ("Second Marquis Decl.").

tect through that statute; petitioners do not have to prove the opposite. *See supra* at 18. Because the Banks have failed to carry that burden, their challenge must be rejected.[10]

C. The Court Of Appeals' "Suitable Challenger" Doctrine Is An Unprincipled And Unwarranted Extension Of This Court's Prudential Standing Jurisprudence

As noted, the court of appeals fully endorsed petitioners' and the district court's understanding of the intent of the FCUA and the common bond provision. Yet the court still conferred standing on the Banks under its "suitable challenger" doctrine—an alternative route to standing created by that court for parties whose interests Congress concededly did not intend to protect or regulate. Under that doctrine, which the court of appeals described as "subtle" and "devilishly complex" (Pet. App. 31a, 37a), such a plaintiff will nevertheless be accorded standing under the APA if its interests, in the court's view, coincide "systematically, not fortuitously * * * with the interests of those whom Congress intended to protect." *HWTC IV*, 885 F.2d at 924. The court held that the Banks had standing under this doctrine because even though the goals of the FCUA and the common bond provision were completely at odds with the competitive interests of the Banks, "[t]here is * * * a reason to think

[10] In *Community First Bank* v. *NCUA*, 41 F.3d 1050 (6th Cir. 1994), the Sixth Circuit conferred standing on banks to challenge NCUA's interpretation of the common bond provision because "[r]efusing to allow competitor banks to challenge credit union expansion might preclude any challenge to an excessively risky credit union expansion." *Id.* at 1054. Not only is this assertion wrong as a factual matter, *see Casazza*, 350 N.W.2d 855 (credit union members brought suit to challenge alleged misapplication of state law common bond requirement), but it squarely conflicts with this Court's unambiguous holdings, *see, e.g.*, *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974) ("[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing").

that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end." Pet. App. 36a.

As noted above, there is no evidence that the common bond provision was intended as a "statutory picket line" separating credit unions from banks, or that Congress viewed the provision as a "constraint on competition" serving some other end. Congress was simply unconcerned with the competitive situation of banks. Yet the court of appeals nevertheless found standing, demonstrating that its suitable challenger doctrine has no basis in this Court's zone of interests jurisprudence and, if accepted, would virtually eliminate any effective limitations on the standing of private plaintiffs to challenge agency actions.

The court of appeals purported to find support for its doctrine in a single footnote in this Court's opinion in *Clarke*, which explained that the zone of interests inquiry "seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n.12. *See* Pet. App. 30a; *HWTC IV*, 885 F.2d at 922. But this Court's opinion in *Clarke* makes quite clear that this footnote was merely describing the effect of the zone of interests analysis—which "at bottom * * * turns on congressional intent," *Clarke*, 479 U.S. at 400—and was not creating an alternative route to standing. Thus, after concluding in *Air Courier* that the postal workers lacked standing under its traditional inquiry into Congress' intent, the Court did not go on to analyze whether the workers—although their interests were not among those Congress intended to protect—nevertheless possessed some characteristic that made them "suitable challengers" of the agency interpretation diverting work from their employer.

The court of appeals' decision in this case demonstrates the limitless malleability of this doctrine. If the court was able to conclude that parties whose interests are

diametrically opposed to those that Congress intended to protect are nevertheless "suitable challengers" of agency action, then it is difficult to conceive of many situations in which a plaintiff would be denied standing. Indeed, in the hypothetical envisioned by the Court in *National Wildlife Federation*—in which a reporting service sought to challenge an agency's failure to follow an "on the record" requirement—the reporting service would be a more suitable challenger than the Banks are here. For unlike in this case, the interests of the reporting service would be directly aligned with the interests Congress sought to further, and there would be no indication that the plaintiff might seek to advance goals at odds with those of Congress. Denying standing to the Banks, who seek to weaken credit unions rather than ensure their continued strength as Congress intended, would in fact further the goal of "exclud[ing] those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n.12.[11]

Moreover, adoption of a test akin to that applied by the court of appeals would allow judges to supplant Congress' intent with the judges' own subjective views about the "suitability" of particular plaintiffs. Unlike this Court's focus on the intent of Congress, the test applied by the court of appeals contains no effective standards to govern its application.[12]

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[11] The court of appeals believed that the Banks were suitable challengers because "when the plaintiff seeks to enforce a statutory restriction on his competition—a restriction the plaintiff enjoys as well as the statutory beneficiaries—there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of the statutory scheme." Pet. App. 37a. The Banks, however, do not "enjoy" the protections of the common bond provision in the same manner as credit union members, and this case demonstrates the serious risk that according them standing will in fact lead to a "misdirection of the statutory scheme."

[12] As then-Chief Judge Wald explained in dissenting from the court of appeals' initial formulation of its suitable challenger doctrine, the doctrine requires "profound judgments about the overall suitability of diverse organizations or sprawling multinational cor-

The zone of interests test furthers important separation of powers concerns. "Like their constitutional counterparts," prudential standing principles "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society' * * *." *Bennett*, 117 S. Ct. at 1161 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). *See also Branch Bank*, 786 F.2d at 624 ("A test requiring only injury in fact—the constitutional minimum—would necessarily obstruct and undermine legislative control and guidance over essentially political issues by conferring standing to litigate on a host of parties whose interests Congress failed to protect."). Where, as here, Congress did not intend to protect the interests of a particular plaintiff against agency action, it is not the function of courts to intrude upon the relationship between the legislative and executive branches by nevertheless seeking to vindicate those interests.

If the Banks desire protection from competition with credit unions, they are free to seek that protection from Congress. But Congress did not provide such protection in the FCUA, and this Court may not act to protect the Banks where Congress has not. *Id.* at 626. As the Court explained recently in *Bennett*, 117 S. Ct. at 1162, "Congress legislates against the background of our prudential standing doctrine," and there is no reason to alter that doctrine by conferring standing on those regarded by the courts—but not Congress—as "suitable challengers" of agency action.

II. NCUA'S MULTIPLE GROUP POLICY IS A REASONABLE INTERPRETATION OF AMBIGUOUS STATUTORY LANGUAGE

Even if the Court were to hold that the Banks have standing, their action should still be dismissed. Contrary

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porations to challenge regulatory schemes, insisting we weigh the various ways in which the entity's interests are internally inconsistent or conflict with other groups who would be within the zone of interests. This is not an appropriate task for the courts." *HWTC IV*, 885 F.2d at 933 (Wald, C.J., dissenting).

to the holding of the court of appeals, Congress has not clearly resolved the question at issue and the Court should therefore defer to NCUA's reasonable interpretation of the statute Congress entrusted it to administer.

This inquiry is governed by the well-settled standards set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under those standards, when a court is asked to consider an expert agency's interpretation of a statute that Congress has entrusted it to administer, the Court must "inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.' " *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995) (quoting *Chevron*, 467 U.S. at 842). If so, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. But " 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, [the court will] give the administrator's judgment 'controlling weight.' " *NationsBank*, 115 S. Ct. at 813-814 (quoting *Chevron*, 467 U.S. at 843, 844). *See also Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2416 (1995) (agency interpretation upheld where "Congress did not unambiguously manifest its intent to adopt [the plaintiffs'] view").

In this case, as explained below, the intent of Congress is not "clear" and "unambiguous" with respect to the "precise question at issue"—whether a federal credit union may consist of multiple occupational groups, each with its own common bond. Accordingly, NCUA's reasonable interpretation of that provision should be upheld.

A. The Statutory Language Permits Credit Unions Consisting Of Multiple Groups

The statute in question, 12 U.S.C. § 1759, provides in pertinent part that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The most that can be said about this language from the Banks' perspective is that it is ambiguous as to the question presented by this case. *See, e.g., Good Samaritan Hospital* v. *Shalala*, 508 U.S. 402, 417 (1993) (statute is ambiguous if there is more than one "plausible" construction); *Sullivan* v. *Everhart*, 494 U.S. 83, 89 (1990) (statutory language does not resolve precise question where there is more than one "possible interpretation"). The statute provides that credit union membership shall be limited to "groups," in the plural, not "a group," indicating that membership in a credit union may consist of multiple occupational groups. Had Congress wished unambiguously to provide that each credit union must consist of a single group with a single common bond, it could have provided that "membership in *each* federal credit union shall be limited to *a* group having a common bond." Congress did not do so, and its intent is therefore not "clear" with respect to the "precise question" raised by the Banks.

In fact, the remainder of Section 1759 indicates that Congress affirmatively intended for credit unions to consist of multiple occupational groups. Congress used the identical term "Federal credit union membership" at two points in the statute. Congress first provided that "Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations * * * as may be elected to membership and as such shall each, subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by *the* board of directors." 12 U.S.C. § 1759 (emphasis supplied). The singular pronoun "its" refers to the term "Federal credit union,"

demonstrating that "Federal credit union membership" was plainly intended to mean membership in a *single* credit union, a reading confirmed by the use of the singular term "*the* board of directors." Thus, when Congress used the identical term "Federal credit union membership" later in the same sentence in the common bond provision, it must be presumed that Congress was likewise referring to membership in a *single* credit union, which Congress then provided may have multiple "groups." *See Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (it is ordinarily presumed that "identical terms within an Act bear the same meaning").

In the court of appeals, the Banks argued that the statute's use of the singular term "*a* common bond" manifests Congress' unambiguous intent that members of each credit union must have a single common bond. The court of appeals swiftly, and correctly, dispatched this argument, noting that "[t]he article 'a' could as easily mean one bond for each group as one bond for all groups in an FCU * * *." Pet. App. 6a. For example, the hypothetical phrase "standing shall be limited to persons having an injury-in-fact" does not mean that each person must share the same injury. Likewise, the phrase "league membership shall be limited to teams having a common uniform color" does not mandate that every team in the league must have the same color uniform. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise, * * * words importing the singular include and apply to several persons, parties or things").

B. The Statutory Language Does Not Unambiguously Provide That All Groups In A Single Credit Union Must Share One Common Bond

Having correctly held that the statute can reasonably be interpreted as permitting a credit union to consist of multiple occupational groups, the court of appeals should have concluded that the statute was ambiguous on the "precise question" presented by this case and therefore that

NCUA's multiple group policy was entitled to deference under *Chevron*. *See K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute."). Yet the court, adopting a novel analysis that had not even been urged by the Banks—itself strong evidence that the meaning was not as plain as the court supposed—held that the statute unambiguously provides that where a credit union consists of multiple groups, there must be a single common bond extending across all the groups.

Relying on a dictionary definition of the term "group" as an "assemblage * * * having some resemblance or common characteristic," Pet. App. 6a (ellipsis in original), the court reasoned that:

> By this definition, a common bond is implicit in the term "group." Therefore, if two or more "occupational groups" can be said to have a common bond, it must be because there is a characteristic common to each and every member of the several groups. [*Id.* at 6a-7a.]

As the court further explained, "[i]f the members of a group are by definition bonded, then it is tautological to say that a single group has a common bond; but if multiple groups are said to have a common bond, then there is no tautology—the members of each group share the same bond as the members of the other groups." *Id.* at 7a.

There are numerous fatal flaws in the court's *sua sponte* analysis. First, even the definition of "group" relied on by the court does not implicitly include the notion of a common *bond*. That definition of a group as an "assemblage * * * having some resemblance or common characteristic" imparts only a minimal degree of commonality. Elsewhere in its opinion, the court of appeals correctly recognized that the common bond provision was designed to be the "cement that united credit union members in a cooperative venture." Pet. App. 31a. This degree of cohesiveness is nowhere implied in the definition of "group" chosen by the court. A "resemblance" or a "common characteristic" is not the same as a common "bond." All employees in the Nation share the common characteristic of working for some employer, but they have no common "bond" that would unite them in a cooperative venture.

But just as importantly, the court conceded that the term "common bond" as applied to the membership of a single group, although in the court's view tautological, might have "reflected ordinary usage in 1934." *Id.* at 7a. In fact, "ordinary usage" both in 1934 and today refutes the court's analysis. In the same dictionary the court relied on to locate its alleged tautology, the term "group" is also defined merely as "[a]n assemblage of persons or things regarded as a unit because of their comparative segregation from others; a cluster; aggregation; as a *group* of trees or of islands." *Webster's New International Dictionary* 955 (1927). This definition—the first general definition of "group" in the dictionary, appearing *before* the one cited by the court below, *see id.*—is quite different from the one relied on by the court of appeals in that it lacks the very element of commonality that the court believed was necessarily implicit in the term "group." Under this definition, individuals could constitute a "group" merely because of their comparative segregation from others and need not possess any commonality aside from that perhaps happenstance segregation. If Congress used the term "group" consistent with this meaning, the addition of the term "common bond" is not tautological at all, but rather imparts a notion of cohesiveness and commonality that is otherwise lacking. For example, people waiting at a stoplight constitute a discernible "group," but we would not in common parlance refer to them as sharing a common *bond*.

Indeed, NCUA interprets the term "group" in just such a manner: its regulations list several examples of occupational or associational "groups"—such as "persons employed or working in Chicago, Illinois"—that nevertheless

lack the requisite common bond. *See supra* at 8.[18] And even if the term group were considered to encompass *some* sort of common bond, the latter term is by no means surplusage when one considers that Congress did not want credit unions to include groups with *any* common bond, but rather only groups having a common bond "of occupation or association." 12 U.S.C. § 1759. Contrary to the court of appeals' reasoning, the statute would not have imparted the same meaning if Congress had limited federal credit union membership to "occupational groups." Pet. App. 7a. For as NCUA itself has explained, there are many "occupational groups" that have no common bond. 59 Fed. Reg. 29,076 (1994).

Thus, even if the court of appeals were correct that one meaning of the term "group" implicitly carries with it the notion of a common bond, the existence of a plausible alternative meaning precludes a finding that the statute is unambiguous under *Chevron*. This was the precise holding in *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992). In that case the agency had interpreted the word "required" broadly, to encompass the meaning "useful and appropriate," but the court of appeals had rejected that interpretation. This Court reversed. It noted that Webster's Dictionary contained alternative definitions of the word, each of which made some sense as used in the statute and one of which supported the agency's interpretation. The Court held that this fact indicated that the statute was "open to interpretation," mandating deference to the agency's view. *Id.* at 418. Here, as well, the existence of an alternative definition of

[18] Members of this Court, as well, have employed a similar syntax implying that the term "organization"—like the term group—does not necessarily include the notion of a common bond. *See New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 19 (1988) (O'Connor & Kennedy, JJ., concurring) ("[T]here may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond.").

the term "group" that supports NCUA's view renders the statute "open to interpretation" and requires that deference be paid to the agency's construction.

Indeed, Congress has shown in another statute that the phrase "groups having a common bond" does not necessarily refer to a single bond that unites the various groups. In 1936, only two years after it enacted the FCUA, Congress enacted a statute under which certain benefits otherwise available only to recognized Indian tribes were extended to groups of Indians in Alaska. That law, which was plainly modeled on the common bond provision of the FCUA, provides that:

> [G]*roups* of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but *having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district*, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans * * *. [25 U.S.C. § 473a (emphasis supplied).]

Under this language, the "common bond" plainly refers to a separate common bond for each of the "groups" of Indians that are to be treated as separate tribes. This later statute, of course, can shed no light on Congress' intent in enacting the FCUA. But its language demonstrates, contrary to the court of appeals' reasoning, that when Congress employs the precise phrase at issue in this case—"groups having a common bond"—it does not necessarily intend to imply that a single bond unites all of the groups.

Nor is a contrary conclusion compelled by the separate clause in Section 1759 providing that Federal credit union membership may also consist of "groups within a well-defined neighborhood, community, or rural district." According to the court of appeals, if this clause were interpreted consistently with NCUA's policy on multiple occupational groups, a single community-based credit union could include groups from different communities. Pet. App. 8a. Because NCUA does not so interpret the com-

munity clause, the court reasoned that it would be inconsistent to interpret the occupational clause as permitting a credit union to consist of multiple groups sponsored by different employers. *Id.* at 8a-9a. *See also First City Bank* v. *NCUA*, 1997 WL 174314 at *3 (6th Cir. April 14, 1997) (adopting same argument); *but see id.* at *7 (Jones, J., dissenting) (rejecting it).

This reasoning is plainly wrong. The occupational and community clauses are not identical: whereas the occupational clause provides that membership shall consist of "groups having a common bond of occupation," the community clause provides that membership shall consist of groups "*within*" a well-defined area. While this latter language may suggest that all the groups comprising the membership must be "within" the same area, the occupational clause contains no such limitation and (as explained above) can be read naturally as providing that the common bond applies to each group in a credit union, not across all of the groups. *See id. at* *9 (Jones, J., dissenting) (view that "the terms of the common bond provision and the community provision must be interpreted in exactly the same way is reading more into the statute than the actual words suggest").

Thus, a provision specifying that "league membership shall be limited to teams within a well-defined area" is perhaps most naturally read to suggest that all the teams must be from the same area, while a provision specifying that "league membership shall be limited to teams having a common uniform color" carries no similar suggestion that all the teams have the same uniform color. This critical difference in the language of the two clauses supports NCUA's separate interpretations of them, and certainly does not demonstrate that the statute is unambiguous.

C. The Purpose Of The Statute And Its Legislative History Do Not Clearly Demonstrate That Congress Resolved The "Precise Question" Presented In This Case

Under *Chevron*, a court must defer to an agency's reasonable interpretation of a statute it is entrusted to administer unless the court, "employing traditional tools of statutory construction," concludes that the "intent of Congress is clear" with regard to the "precise question at issue." 467 U.S. at 842-843 & n.9. Where, as here, the language is ambiguous, *Chevron* allows only a limited role for such traditional tools as legislative history and statutory purpose. The Court may not simply examine the legislative history and purposes of the statute and impose "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, the Court must defer to the agency's interpretation unless the legislative history and purposes of the statute "compel the conclusion" that Congress clearly resolved the precise question at issue. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990). If the legislative history is "conflicting" or "ambiguous," then the agency's interpretation is entitled to deference. *Rust* v. *Sullivan*, 500 U.S. 173, 185 n.3, 186 (1991).

Here, the legislative history and statutory purpose do not clearly demonstrate that Congress resolved the precise question whether a federal credit union may consist of multiple occupational groups, each with its own common bond. As the district court held, the legislative history is in fact "murky" on that question and is only a "slender reed on which to place reliance." Pet. App. 30a.[14] Indeed, there is some evidence in the legislative history that Congress intended to permit multiple groups. The House Re-

[14] The court of appeals did not disagree. Rather, in light of the court's erroneous conclusion that the plain language of the statute unambiguously resolved the issue, the court concluded only that the legislative history was not sufficiently compelling to override what the court considered to be clear statutory language. Pet. App. 11a-12a.

port on the FCUA provides that "[m]embership in Federal credit unions is limited to *groups* having common bonds of occupation or association or to groups within well defined communities." H.R. Rep. No. 2021, *supra*, at 3 (emphasis supplied). A colloquy during House consideration of the Act likewise indicates that Congress may have believed that a credit union could consist of multiple occupational groups. In response to a question whether the FCUA would "take care of small business men who have one or two clerks," Rep. Luce answered that "I have no reason to believe that they cannot join the union and profit thereby * * *." 78 Cong. Rec. 12,225 (1934). A credit union of one or two members is not economically feasible, either now or in 1934. *See* IRPS 89-1, 54 Fed. Reg. 31,171 (1989) (NCUA policy that credit unions should not have less than 500 members). Accordingly, this colloquy indicates that Congress may have believed that a small business with only a few employees could "join" an existing credit union.[15]

As the district court concluded, "[t]he legislative record, taken as a whole, does not provide the clear and certain indication that Congress intended to preclude the NCUA's current interpretation of the common bond provision." Pet. App. 21a. Selective excerpts from legislative history are of dubious utility even where the Court is interpreting a statute *de novo*. Where, as here, the task is to determine whether Congress has clearly resolved a precise

[15] The Banks have relied on a statement in the Senate Report describing a credit union as a cooperative society "organized in accordance with the provisions of a specific credit-union law, carefully supervised, self-managed, limited in each case to the members of a specific group with a common bond of occupation or association * * *." S. Rep. No. 555, *supra*, at 2. This statement, however, was not purporting to describe Congress' intent in enacting the common bond provision. Rather it was simply a response under the heading "What is a credit union?," and therefore is best read as a general description of the membership of most credit unions of the day. As the district court held, the statement "may well be little more than a description of the field of state credit unions as they existed in 1934." Pet. App. 20a.

question on which the statutory language is ambiguous, such conflicting excerpts are of no use whatsoever.

Nor do the general purposes of the statute clearly demonstrate that Congress has resolved the multiple group issue. The court of appeals held that because the common bond provision was intended to foster a "cohesive association in which the members are known by the officers and by each other," there was "little doubt that growth on the scale achieved by ATTF is inconsistent with that purpose." Pet. App. 10a. The court of appeals' reasoning, however, cannot withstand scrutiny. Congress did not intend that all members of a credit union necessarily be "known by the officers and by each other." At the time the FCUA was enacted, Congress was well aware that there were credit unions that contained thousands of members, *see Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933), and one of Congress' main purposes in enacting the FCUA was to authorize *national* credit unions whose membership crossed state lines. *See* H.R. Rep. No. 2021, *supra*, at 2. Even under the Banks' reading of the common bond provision, there would be large single-employer credit unions whose officers and members could not possibly all know one another. Recognizing this fact, NCUA and its predecessor—in actions that have never been challenged—long ago removed anachronistic regulations that had required all members of a credit union to "know" or be "extensively acquainted" with one another. *See* GAO, *Credit Unions: Reforms for Ensuring Future Soundness* 217 (July 1991); NCUA, *Organizing a Federal Credit Union* 3 (Sept. 1972).

Instead, the general purpose of the common bond provision, as explained above, was to increase the financial stability of credit unions by ensuring that members would be part of a cooperative organization. *See supra* at 20-21. As the court of appeals put it, "[t]he common bond was seen as the cement that united credit union members in a cooperative venture * * *." Pet. App. 31a. There are

sound economic reasons why cooperative lending societies might employ a common bond concept. Basing membership on some sort of pre-existing associational affinity allows a credit union to "loan on character," because the credit union would have better access to information on the reputation and creditworthiness of members; it helps to ensure repayment through the moral suasion and social pressure of fellow members; and it often allows a convenient means of securing that repayment (such as through payroll deductions for employer-based groups). *See* Henry Hansmann, *The Ownership of Enterprise* 259 (1996).

These general purposes, however, do not demonstrate that Congress necessarily foreclosed NCUA's multiple group policy. Under that policy, membership in any credit union must still be based on membership in some *group*. Unlike banks, credit unions may not serve any individual who desires service; rather, every credit union member must have a common bond of occupation or association with the other members of his or her group. Thus, under NCUA's multiple group policy, a credit union member will be less likely to default because the member would know that his or her co-workers might be affected. Likewise, the credit union would still gain (through the group sponsor or a member's co-workers) additional information about creditworthiness that a bank would not have. In short, any benefits that would result from limiting credit union membership to individuals who have a common bond with other members can be achieved through the multiple group policy.

The court of appeals' focus on the size of ATTF's membership is therefore misplaced. The benefits of an occupational common bond result not from the size of the organization, but from the fact that each member is part of a cooperative venture with his or her co-workers. For example, in a large, nationwide single-employer credit union (which even the Banks admit is lawful), the benefits of the common bond are achieved not because every member knows and is able to keep tabs on every other

member throughout the country, but because every member is united in some way with a group of employees with whom he or she works. The multiple group policy is true to this purpose. Even the court of appeals would allow a credit union to contain multiple groups consisting of employees of separate companies located thousands of miles apart, where the only connection between the companies is common ownership. *See* Pet. App. 7a. There is no reason why this credit union would further the purposes of the common bond provision any more than would a credit union composed of the same groups where common ownership is lacking.

It is simply not true, as the court of appeals suggests, that under the multiple group policy a federal credit union "could accept anyone as a member simply because he or she is employed." Pet. App. 10a. Under NCUA's interpretation of the statute, membership in a credit union may not be opened to anyone who has a job, because the mere fact of employment—although it may define a "group" of individuals—does not qualify as a common bond. Nor can a credit union circumvent that restriction by attempting to designate its membership as the employees of every firm in the country. Under NCUA's interpretation of the statute, each group in a credit union must separately request inclusion in the credit union, and NCUA scrutinizes such requests to determine that the credit union has the financial resources and management capability to provide quality service to each group, and that credit unions will not have overlapping memberships. *See* 59 Fed. Reg. 29,078 (1994).[16]

Finally, as explained above, Congress' express purpose in enacting the common bond provision and the entire

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[16] Such challenges to the reasonableness of NCUA's interpretation are, in any event, properly addressed under the second prong of the *Chevron* analysis. *See Chevron*, 467 U.S. at 843-844. The Banks have limited their challenge in this case to the first prong. *See* Pet. App. 6a ("FNBT argues this case under step one of *Chevron* only."); *id.* at 23a ("Plaintiffs have not seriously argued that the interpretation under challenge is unreasonable.").

FCUA was not merely to ensure that credit union members were part of a cooperative venture—Congress' primary purpose was to encourage the growth and financial stability of credit unions. NCUA's multiple group policy —adopted to increase the growth and strength of federal credit unions in the face of changing economic circumstances—is entirely consistent with that overriding purpose. *See* J.A. 41-43; 49 Fed. Reg. 46,537 (1984); 48 Fed. Reg. 4799 (1983). As NCUA has explained, because many employer groups are too small to support a credit union by themselves, the multiple group policy allows credit union services to be provided to many workers who otherwise would not have access to them. J.A. 42-44. And because credit unions limited to a single employer are perilously vulnerable to downturns within that industry or company, the diversification allowed by the multiple group policy provides needed financial stability. *Id.* at 43-44.

The purposes of the statute, like its language and legislative history, thus do not clearly demonstrate that Congress has spoken to the precise issue presented by this case. "Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches," for "the resolution of ambiguity in a statutory text is often more a question of policy than of law." *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Here, whether by design or accident, Congress enacted an ambiguous statute that does not resolve the precise question presented by this case. Given that fact, it is the role of NCUA—not the courts—to resolve that ambiguity through an exercise of its expert policy judgment.

D. NCUA's Policy Is A Reasonable Balancing Of Congress' Policy Objectives

Neither in the district court, the court of appeals, or their brief in opposition to certiorari did the Banks advance the argument that, if the statutory language were held to be ambiguous, NCUA's multiple group policy is

nevertheless unreasonable and should be invalidated under the second step in the *Chevron* analysis. *See* Pet. App. 6a, 23a. Accordingly, the Court should not consider that issue. *See, e.g., Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990). It is little wonder, however, that the Banks did not raise this argument. For, as the district court noted, this "would be a daunting task" because "NCUA's interpretation in fact advances Congress' goal of promoting the creation and growth of credit unions." Pet. App. 24a.

Under *Chevron*, once the Court concludes that Congress has not spoken to the precise question at issue, the agency's interpretation must be sustained if it is "reasonable in light of the legislature's revealed design." *NationsBank*, 115 S. Ct. at 813-814. NCUA's multiple group policy is plainly reasonable in light of Congress' purposes in enacting the FCUA. The agency has adopted a policy that strikes a reasonable balance between Congress' twin goals of encouraging the growth and viability of federal credit unions and ensuring that credit union members are part of a cooperative venture with others similarly situated. The reasonableness of this balancing of policy objectives is further supported by the fact that Congress has been well aware of the multiple group policy for nearly 15 years without altering it, despite amending the FCUA on numerous occasions. *See United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction").

Agencies do not " 'establish rules of conduct to last forever,' " but rather must have "ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' " *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citation omitted). *See also Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996); *Rust* v. *Sullivan*, 500 U.S. at 186-187. When Congress established NCUA,

it directed the agency to "provide more flexible and innovative regulation." S. Rep. No. 518, *supra*, at 3. In response to that mandate, NCUA's common bond policy has evolved over the years in order "to reflect changing social, commercial and economic conditions." 44 Fed. Reg. 8272, 43737 (1979).

The multiple group policy was adopted specifically in response to changes in the general economy and in the economics of credit unions in particular. That policy was plainly a reasonable response to the potential instability of single group credit unions, whose fates are tied to the fortunes of a single company or industry, and to their inability to serve many individuals employed by companies too small to support a credit union on their own. *See* J.A. 43-44; *see also* Stephen A. Woodbury, David M. Smith & William A. Kelly, Jr., *An Analysis of Public Policy on Credit Union Select Employee Groups* 2-3 (U. Wisc.-Madison 1997) (62% of Nation's workers are employed by firms that are too small to support a single-group credit union under NCUA guidelines). Moreover, as the district court held, because the potential harm from credit union defaults diminished with the advent of share insurance in 1970, NCUA could reasonably decide that a restrictive interpretation of the common bond provision was no longer needed. *See* Pet. App. 23a.

The reasonableness of NCUA's multiple group policy is further shown by its unqualified success and by the enormous harm that would result if the Banks were to prevail in this action. The policy has been a principal means for the growth in federal credit union membership since 1982. It has allowed approximately 3,500 credit unions (half of all federal credit unions nationwide), serving more than 32 million people in about 156,000 employer groups, to diversify their membership in a manner that protects the safety and soundness of the credit union system and the resources of the National Credit Union Share Insurance Fund. *See* Second Marquis Decl. ¶ 5; Third Declaration of David M. Marquis ¶ 7 (Nov. 14, 1996) (R. 105). At the same time, the rate of credit

union failures has declined steadily, belying the Banks' premise that the multiple group policy has compromised the protections inherent in the common bond provision. *See* NCUA 1995 Annual Report 23; NCUA 1994 Annual Report 20; NCUA 1993 Annual Report 14.

Conversely, if the Banks were to be successful in overturning NCUA's multiple group policy, the result could be devastating for credit unions throughout the Nation and for the individuals who depend on them for low-cost financial services. As NCUA determined in promulgating that policy, prohibiting diversification of membership will increase the level of credit union defaults and liquidations, and will profoundly affect the financial health of thousands of federal credit unions. And as Congress determined when it enacted the FCUA, many of the low-income individuals whom the Banks seek to prevent from joining federal credit unions would be unable to utilize the services of banks or could do so only at higher cost.

* * * *

These considerations not only demonstrate the reasonableness of NCUA's balancing of Congress' policy objectives, but also starkly confirm that the Banks' interests in dismembering credit unions are completely at odds with Congress' purposes of encouraging the growth and financial stability of a national credit union system. Accordingly, the Court should find that the Banks lack standing to prosecute this action. But even if the Court were to hold otherwise, it should nevertheless uphold NCUA's reasonable resolution of the ambiguous statutory language.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

PERTINENT STATUTES

Section 1759 of Title 12, U.S.C., provides in pertinent part:

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

Section 702 of Title 5, U.S.C., provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.